U.S. SUPREME COURT
OCTOBER TERM 1979
NO. 79-1234

H.L. RICHARDSON, ET AL.,
PETITIONERS,
VS.
BOB LOKEY,
RESPONDENT.

# MOTION TO PROCEED IN FORMA PAUPERIS

UNDER THE APPROPRIATE TITLES, SECTIONS, AND RULES OF FEDERAL PROCEDURE* I HEREBY REQUEST THAT I BE ALLOWED TO PROCEED IN FORMA PAUPERIS IN THIS ACTION.

Bob Lokey

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* THIS COUNTY HAS NO PROVISIONS FOR MAKING FEDERAL REFERENCE BOOKS AVAILABLE TO PRISONERS; THESE MOTIONS ARE THE BEST I CAN DO FROM MEMORY.

STATE OF CALIFORNIA }
COUNTY OF PLACER } SS:

# AFFIDAVIT OF POVERTY

I, BOB LOKEY, AM WITHOUT FUNDS OR OTHER ASSETS, EXCEPT FOR TWENTY-SIX DOLLARS ($26.00).

I HAVE NO MEANS WITH WHICH TO PAY COSTS IN THE ACTION IN THIS COURT ENTITLED, H.L. RICHARDSON VS. BOB LOKEY # 79-1234.

I DECLARE UNDER PENALTY OF ~~PERJURY THAT~~ THE FOREGOING IS TRUE AND CORRECT.

Bob Lokey

RECEIVED
JUL 7 - 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TO THE CLERK OF THE U.S. SUPREME COURT:

The legal library is closed and I have no way to get the within papers notarized right away. My feeling is that time is of the essence, so in lieu of notarization I have placed my thumb print with my signature as proof of signature.

Bob Lokey
Respondent

Bob Lokey, Pro se
P.O. Box A-75356
Tamal, California 94974

IN PROPRIA PERSONA

RECEIVED
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IN THE

UNITED STATES SUPREME COURT

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| H.L. RICHARDSON, et al., Petitioner, -vs- BOB LOKEY, et al., Respondent. | CASE #79-1234 RESPONSE TO PETITION FOR A WRIT OF CERTIORARI |

DECLARATION OF RESPONDENT

Upon the filing of the petitioner's brief in this case, respondent was in the Placer County Jail, Auburn, California. The initial service of the petition on respondent did not occur. Respondent was notified much later by the California Attorney General that briefs had been filed, and respondent was then served with xeroxed copies of the petition. Respondent then wrote a petition to the U.S. Supreme Court requesting appointment of counsel, and requesting an extension of time to file responsive papers. Respondent heard no more until today, June 27, 1980, that the Clerk of the Court had called the Prison

at San Quentin (where respondent is presently confined) expecting respondent's brief per the Clerk's letter of May 20. Respondent has not received such a letter. Respondent has been in transit from County Jail to Vacaville Prison, then San Quentin Prison, then back to Placer County Jail, and finally back to San Quentin again, all within the past two months. Evidently, that letter must either be lost, misplaced, destroyed, or has not yet caught up with respondent.

Further, respondent's copies of the Petition for Writ of Certiorari which were belatedly served on him have been lost, misplaced, or destroyed by prison or jail officials who have handled it. Respondent does not have copies of the petition at all.

Because of the above, respondent's brief is being prepared entirely from memory, with no reference material. Respondent therefore seeks the indulgence of the Court and asks that he be not bound too strictly to proper form.

I declare under the penalty of perjury that the foregoing is true and correct.

Bob Lokey

Bob Lokey, Pro se
Respondent

Petitioner's Statement of the Case is essentially true, and the chronology of events is not in dispute. The only basic disagreement is whether the acts respondent complained of in the Courts Below were permissible.

1. Petitioners admit that respondent's factual allegations are true. It is petitioner's contention that relief should not have been granted on respondent's Section 1983 civil rights suit, and they cite Montanye and Meachum--that respondent had no claim on any right, rooted in State law, that he could expect that his previously earned custody and living conditions (and all that these things meant) could not be drastically altered without any hearing and at any whim and caprice of State officials.

2. The petitioner raises the "awful specter" that, if respondent finally prevails in this lawsuit, then any prisoner on any pretext whatever, regardless how trivial, will be able to successfully challenge any and all prison officials' decisions, including the most routine and insignificant.

First, the factual situations in Montanye and Meachum vary considerably from respondent's:

a. In these cases some form of hearing was afforded where the prisoners at least knew what they were being charged with or accused of.

b. They had been suspected of actually violating some prison rule, or committing some act (however slight) that the officials construed needful of disciplinary attention.

c. The rule which was enforced to alter their conditions of confinement was not designed after the fact so that it could be used for the special purpose of punishing only one prisoner or one class of prisoner.

d. The conditions which those prisoners suffered being altered were not as drastic as in respondent's case, nor were the effects of the alteration so pervasive and far reaching.

In contrast with the prisoners in Montanye and Meachum, respondent was not accorded a hearing, even though it was standard and common practice in California Prisons to conduct hearings when any change was contemplated in a prisoner's situation, especially when such change would have a negative impact, and the prisoner was always allowed to be present (absent some extreme life or death situation.) The petitioner does allege that, in determining respondent's fate, a board of officials in Sacramento (which is about one hundred miles removed from San Quentin and respondent's presence) "considered all case factors." However, except for that vague reference, neither the Court nor respondent even today has any idea what actually took place in Sacramento at that time or even if such could be construed a "hearing" in any meaningful sense of the word.

Respondent had not been suspected or accused of violating any prison rule, had not demonstrated to be, nor was suspected of being any kind of custodial risk; to the contrary, as petitioner concedes in all their briefs below, respondent's behavior was

and had been exemplary, ranging from above average to exceptional. In order to punish respondent, petitioner passed an ex post facto rule, a rule which previously didn't exist, and even then admitted that it had nothing particular to do with respondent, but was because the courts had outlawed the death penalty in California, and some unnamed individual had escaped from an unnamed California institution. Exactly what connection these events had to respondent has not been explained by petitioner at any time.

The petitioner has attempted to minimize the meaning that minimum custody had in respondent's life in 1972. In a general manner the petitioner attempts to convey that what happened to respondent is related to the more routine matters that happen within the day to day prison doings, and that if the courts interfere, it will surely cripple the ability of prison officials to make all of the mundane, even trifling decisions of each day. As shown, what respondent suffered was extraordinary, not trifling and mundane. Even so, the federal courts demonstrate daily that each case is individual, with an individual set of facts in each. Certainly, if respondent finally prevails in this case, which has been more than eight (8) years in litigation, it would be ludicrous to extrapolate a situation where the courts suddenly are forced to grant civil rights relief to all prisoners who were deprived of a toothbrush for a day or two, or who were issued clothing that didn't fit properly.

The argument advanced by petitioner in this regard is frivolous on its face.

In the instant case, the possibility of a commutation and parole for respondent hung in the balance; his ability to maintain his status quo was a prime factor in recommendation for commutation and parole. A parole board which had previously recommended commutation and parole suddenly reversed itself and recommended against these. Respondent's living conditions did not simply change from one cell or housing unit or prison to one more or less similar. There was a drastic alteration; the same difference between living in an honor unit and in the hole. The family visitation privilege being so abruptly terminated and the frustration and anguish suffered by respondent's wife caused her to cease visiting altogether and led to eventual divorce. For the ten years previously respondent's wife and children had been steady visitors, and the expanded kind of relationship afforded by overnight family visitation was an increased cohesive force in the marriage. Unfortunately, when it was so abruptly terminated without cause, it was also a longer distance to fall from for respondent's wife, who finally threw up her hands in frustration and ceased communication with respondent altogether.

The State officials named in the moving papers below wreaked havoc in respondent's life, without a hearing, without even giving respondent a reason for it, until respondent initiated the present civil rights action, which, as noted by the 9th Circuit

Court in its earlier opinion, engendered an even more hostile and abusive reaction from one of the defendants, then Director of Corrections, Raymond K. Procunier. When the present complaint made it necessary for State officials to come up with a reason for the actions against respondent, the best they could come up with was that the death penalty was unconstitutional and an unnamed prisoner had escaped from an unnamed institution. The petitioner has never demonstrated any reason for applying these factors to respondent, other than that he was in a special class of prisoner bv virtue of the kind of sentence he was serving.

Respondent submits that the "reasons" proffered by the petitioner for such drastic maltreatment of respondent amounts to no reason, and could be more properly labelled whim and caprice. It is tantamount to saying, "Because it rained today we put all the prisoners convicted of burglary in the hole." There is no rational connection between the cause and the effect.

Petitioner alleges that respondent had no life, liberty or property rights of due process rooted in State law. In 1972 such a due process clause was embodied in California Constitution at Article 1, Section 13, in the same manner that the federal due process right is embodied in the U.S. Constitution at the Fifth Amendment. Article 1, Section 13, stated, in pertinent part:

> "...No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law;..." (Emphasis added.)

The above section was changed in 1974, and the due process clause was embodied in its own separate section at Article 1, Section 7(a).

In 1972, the California Constitution did not exclude prisoners from the meaning of "person."

Further, the Fourteenth Amendment of the United States Constitution is applicable only to actions taken by representatives of state government. There can be no doubt that action taken by correctional institutional staff is governmental action, or "state action" as the term is used in the Fourteenth Amendment. All institutional personnel are state employees who hold their authority and position as a result of the state granting them that authority or position.

As stated by the Supreme Court:

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color" of state law." (United States vs. Classic, 313 U.S. 299, 326 (1941)).

A prison proceeding which results in disciplinary punishments on a prisoner in which the prisoner is not informed of the nature of the accusation against him nor of any evidence to be used against him does not comply with due process requirements, as mandated in the equal protection clause.

Viewed in its full light, the petitioner is not asking the Court in the Petition for a Writ of Certiorari to co-sign

a reasonable ability of prison officials to make mundane prison decisions so as not to be concerned with Section 1983 interference. The federal courts have never interfered with the prisons in the "awful specter" manner hypothecated by the petitioner, and there is no reason to assume they ever will. What petitioner is actually asking for is unchecked and unlimited power over the lives and bodies of prisoners. Petitioner is asking for the power to wreak havoc in the lives of prisoners, on the slightestor no provocation, for reasons ranging from whim and caprice to legitimate. There were general provisions of law, customs and practices in 1972 which were prohibitory of outrageous and unjustified actions of State officials, even though not specifically named in constitutional or statutory provisions. There is not nor ever has been any provision of constitutional law which in the most explicit language prohibits prison officials from committing each and every imaginable wrongful action against prisoners.

In the absence of the most explicit constitutional or statutorily prohibitive language, it is the essence of the courts' purpose to determine what actions complained of might rise to prohibitory proportions and invoke such basic rights as due process of law. There is no constitutional law expressly against cutting out the tongues of prisoners who talk too much, but if prison officials committed this act it certainly wouldn't be condoned by the courts on the grounds that there was no statutory

or constitutional language expressly forbidding the act. Yet, that is exactly what the petitioner argues for. If the act is not prohibited in the most particularly tailored constitutional or statutory language, then the courts should consider it lawful for prison officials to perform it.

Certainly there was no special statute in 1972 which explicitly declared it unlawful for prison officials to deprive respondent of his family relations, for no good reason. But the rules of the prison allowed the marriage and family relations to exist, allowed the family visits to be engaged in for more than two (2) years, allowed minimum custody to be earned by deserving prisoners, and allowed living conditions for respondent not unlike those enjoyed by firemen anywhere in the world. If passing an ex post facto rule in order to deprive respondent of these, and providing no hearing or stated reason for so doing wouldn't be sufficient to invoke the due process clause, then nothing short of murder would seem to invoke it.

Even so, the rule itself stated that only persons not deserving of such privileges would be deprived. Petitioner did not follow the very guidelines of the ex post facto rule they created to deprive respondent in the manner complained of. The rule was to be individually applied and those deserving were to maintain whatever status quo had previously been earned. It was not shown that respondent was undeserving.

On the one side of the coin the petitioner extrapolates the "awful specter" of absolute and total judicial intervention

if respondent finally prevails in this suit. However, on the other side of the same coin, if prison officials get away with what happened here, then there will exist little hope of judicial review of their actions short of the most outrageous, such as dismemberment or murder. A final determination of this suit will definitely be a message to prison officials and will signal the heights to which their sometime wholly arbitrary acts can be expected to rise and not be frowned upon by the judiciary.

The question raised by respondent all along has been one of degree, not of absolute totality. In short, what degree of harm will the judiciary condone being visited on state prisoners without any showing of good cause? And, does the judiciary hold as good cause in this case the justification proffered by the petitioner, that is, that respondent was punished in the manner shown, without a hearing, without charges or accusation of any kind, on the grounds that the courts had recently overturned the death penalty in California and an unnamed individual had recently escaped from an unnamed California institution?

For the foregoing reasons, respondent respectfully prays that the Petition for a Writ of Certiorari be dismissed.

Date: June 30, 1980

Respectfully submitted,

Bob Lokey

Bob Lokey, Pro se
Respondent

I declare under the penalty of perjury that the foregoing is true and correct.

Date: June 30, 1980

Bob Lokey

Bob Lokey, pro se
Respondent

State of California )
) ss: PROOF OF SERVICE BY MAIL
County of Marin )

I, Bob Lokey, duly sworn, depose and say:

1. That I am the respondent and party to the attached matter entitled Response to Petition for a Writ of Certiorari:

2. That I am a citizen of the United States, a resident of Marin County, California, and am over the age of eighteen (18) years;

3. That I served a copy of the within Response to Petition for a Writ of Certiorari on the opposing party, this day, June 30, 1980, by placing said papers in the mailbox here at San Quentin Prison, where I am presently confined, addressed in the following manner:

John T. Murphy, Esq.
Deputy Attorney General of California
350 McAllister Street
6000 State Building
San Francisco, Ca 94102

I declare under the penalty of perjury that the foregoing is true and correct.

Date: June 30, 1980

Bob Lokey
Bob Lokey
Affiant